No. 18826

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CHARLES ALBERT GARRETT and
DOROTHY ELIZABETH DARLING,
Appellants,

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the United States District Court
for the District of Arizona

BRIEF FOR APPELLEE

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BRIEF OF APPELLEE

JURISDICTIONAL FACTS

Appellants, having been indicted on March 26, 1963, by the Grand Jury for the District of Arizona, entered, respectively, pleas of not guilty to the Indictment on April 8, 1963. A verdict of guilty was returned by the jury on June 11, 1963 as to each defendant and they were adjudged guilty by the Court on June 24, 1963, immediately after the denial by the Court of Motions for New Trial filed by each appellant.

This Court has jurisdiction under Title 28 United States Code, Section 1291.

STATEMENT OF FACTS

Customs Agents Viles and Rogers, during a routine patrol, observed a colored male in the vicinity of the International fence between the United States of America and the United States of Mexico who aroused their suspicions (Transcript of Record, Volume Two, hereinafter designated TRT, P 16-20, 102-103). As a result thereof, another Customs Agent, Aros, was called and, after obtaining a portable radio and binoculars, he situated himself on a little hill overlooking the area where the man had been seen and maintained a lookout. (TRT P 47-48). Thereafter, Mr. Aros observed a man, whom he identified as the Defendant Garrett, get out of a Mexican Yellow Cab on the Mexican side of the border, look to both sides, and make a throwing movement. Mr. Aros observed a black object come over the International fence toward him. (TRT P 50, 51, 67). Agent Aros described the man and his actions to the other agents by radio (TRT P 51). After Mr. Garrett walked away from the area, Aros found the object(the location of which he had fixed by reference to cars on the Mexican side of the border), opened it, observed its contents to be a grayish-brown powder which he assumed to be heroin, placed an initialed slip of paper therein, resealed and left it where he had found it. (TRT P 52).

Mr. Garrett was next observed by Agent Viles (recognized by the description furnished by Mr. Aros) in the company of Miss Darling entering the United States from Mexico. He identified both as the defendants in the case. (TRT P 104-105). A Nogales, Arizona, police officer followed the appellants at the request of Viles and observed them get into a 1956 Lincoln convertible in Nogales, Arizona, and drive off in a southerly direction. (TRT P 96). The appellants were thereafter under virtually continuous surveillance by Officer Salmon (TRT P 97), Agent Viles (TRT P 106) and Agent

Rogers (TRT P 23), and they proceeded, with Mr. Garrett driving, to precisely the spot where Mr. Aros had found the package (TRT P 53). The car stopped briefly and, after it departed the area, Mr. Aros, who saw the car door open and heard it slam, sought the package, but could not find it. (TRT P 53-54).

Thereafter, having received this information, the other officers followed and stopped the automobile (TRT P 108) and ultimately recovered the package from Miss Darling. (TRT P 24-26, 56-57, 106-110). The package and contents, after having been duly identified, were admitted into evidence (TRT P 131). The contents, having been previously analyzed, were designated to contain heroin (TRT P 127).

Mr. Garrett crossed from the United States into Mexico with Miss Darling and went with her directly to a dentist's office, according to his testimony (TRT P 146-147), where he left her. (TRT P 173). He then testified to leaving the building and office while Miss Darling was undergoing treatment and that when he returned she was *just coming out* of the dentist's office—about twenty minutes later. (TRT P 146-149, 173-175).

At the conclusion of all the evidence and following the Court's instructions, the jury returned the aforesaid verdicts of guilty as to each defendant.

OPPOSITION TO SPECIFICATIONS OF ERROR

Although Appellant's brief does not contain specifications of error, it appears from the Argument contained therein that Appellants rely on Items First, Second and Fourth as set forth in the Statement of Points in the Designation of Record on

Appeal as to each defendant (Transcript of Record, Volume I, P 29-32). As to those, Appellee replies as follows:

1. The record reflects that the conviction of each appellant is supported by substantial evidence.

2. No hearsay evidence was admitted over timely and proper objection and the Court was not requested to instruct the jury to disregard any evidence to which objection was sustained.

Appellants argue that certain expert opinion evidence was admitted without foundation, to which Appellee replies as follows:

3. The testimony designated as objectionable by Appellants was not substantive expert testimony and was not heretofore objected to, designated, or specified as error.

SUMMARY OF ARGUMENT

1. The verdict of guilty should be sustained in the absence of plain error unduly prejudicing the rights of the defendant in that, taking the view most favorable to the Government, there is substantial evidence to support it.

2. Testimony by a witness of his conversation at a prior time does not constitute hearsay, nor does the overheard conversation of another if related by the witness merely for the fact and not the truth thereof.

3. In the absence of timely and proper objections the Appellate Court will take cognizance of alleged error only if plain error prejudicial to the defendants.

ARGUMENT

1. SUBSTANTIAL EVIDENCE SUPPORTS THE VERDICT.

It is almost axiomatic, requiring no citation, that if, taking the view most favorable to the Government, a verdict of guilty is supported by substantial evidence it must be sustained. *Glasser v. United States,* (1941) 315 U.S. 60, 74 S.Ct. 457, 86 L.Ed. 680. *Substantial evidence,* although variously defined by the Courts, has been accepted by this Court as ". . . such relevant evidence as a reasonable mind might accept as adequate to support a conclusion . . ." *Woodard Laboratories v. United States,* (C.A. 9th, 1952) 198 F.2d 995, 998. The Court in *Woodard* acknowledged the proposition that it is not the function of the Appellate Court to weigh the evidence or to determine the credibility of witnesses.

Although not supported by all of the authorities cited by Appellants, the rule of law that a conviction may not be based on mere suspicion is settled and so stated by the trial court as part of the instructions given the jury (TRT P 192). The record, which Appellant contends fails to disclose anything as against Garrett except close proximity to contraband, reflects, as reviewed in the Statement of Facts, the eye-witness testimony of Aros demonstrating the closeness of that proximity. The description of the man making the "throwing motion" was sufficiently accurate for Mr. Viles, who had never seen the Defendant Garrett, to recognize him and initiate surveillance. Mr. Garrett's driving to and stopping at the precise spot where the narcotics fell in the United States is particularly persuasive when, by his own testimony, Miss Darling could not have known that location. Her actual possession and his actual, or at least constructive, possession under the appropriate instructions, as given by the Court, (TRT P 198-200)

give rise to the statutory presumption as to importation and knowledge. *Title 21 U.S.C.* § *174.*

Although the quotation on page 10 of Appellant's brief could not be found in the case cited, the nature thereof was such as to inspire a search for its source. In the case of *United States v. J & R Transport Company,* (D.C. E.D. Pa. 1959) 176 F.Supp. 871, 872, the quotation appears almost verbatim. In that case the Court went on to say that as an instruction that language had been criticized in *Holland v. United States,* (1954), 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150.

The evidence, as above, and it is submitted, as a whole, was sufficiently strong to banish all reasonable doubt as well as being "adequate to support a conclusion."

2. WITNESSES' OWN PRIOR CONVERSATION NOT HEARSAY NOR IS THE FACT OF ANOTHER'S CONVERSATION

3. ONLY PLAIN AND PREJUDICIAL ERROR RECOGNIZED ON APPEAL IN ABSENCE OF OBJECTION

(a) Appellant's set forth the conversation of Viles as related in the testimony of Rogers (TRT P 20-21) as hearsay. Objection thereto was over-ruled (TRT P 21).

(b) Appellants specify R. 23-24 as containing objectionable hearsay. Objection was made (TRT P 25) and sustained.

(c) Appellants specify R. 47-48 as objectionable. No objection thereon is recorded.

(d) Appellants specify R. 55 and R. 103 as containing objectionable hearsay. No hearsay objection is recorded thereon.

(e) Appellants specify R. 107 as objectionable. The objection asserted was over-ruled (TRT P 107).

No request was made of the Court that the jury be instructed to disregard the above testimony given. The failure thereof limits this Court's consideration thereof. *Myers v. United States,* (C.A. 3d, 1929), 36 F.2d 859.

As to Items (a) and (e), the Court properly over-ruled the objection asserted in that the conversations related by the witness were either his own statements of what he did or related for the fact of the conversation as precedent to action on his part. As stated by the Court in the case cited by Appellants:

> ". . . However, not every oral or written extrajudicial statement offered in evidence comes within the hearsay rule. It is only where the extrajudicial statement is offered to establish the truth of the fact so stated that the hearsay rule can apply. Where the extrajudicial statement is offered without reference to the truth of the matter extrajudicially asserted, but merely to prove that the oral statement, in fact, was made or that a written statement, in fact, exists, then evidence is without the hearsay rule. . . ."
>
> *United States v. Campanaro,* (D.C. E.D. Pa. 1945), 63 F.Supp. 811, 814.

As to Item (b), objection was sustained and the witnesses' testimony prior thereto falls into the above category.

As to Items (c) and (d), no objections having been raised the objections cannot be raised on review unless in light of all the facts so prejudiced Appellants as to deny them a fair trial. *Hill v. United States,* (C.A. 9th, 1958), 261 F.2d 483.

It is submitted that, even if objectionable, the testimony was insignificant in view of all the facts and not prejudicial.

To the same effect is Appellants' Argument as to purported "expert" testimony of M. R. Rogers (TRT P 27). No objection was raised thereon below and, as aforesaid. cannot now be raised in the absence of plain error. *Hill v. United States, supra.* Further, it is apparent that Rogers was merely testifying to what he did and said and not as giving substantive expert testimony. Further, expert opinion having been subsequently received as to the contents of the package recovered (TRT P 127), Rogers' testimony could not have been projudicial to Appellants.

CONCLUSION

The rulings of the Court having been proper, no error of consequence having been shown and the jury's verdict having been supported by substantial evidence, it is submitted, the judgment should be affirmed.

Respectfully submitted,
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I certify that, in connection with the preparation of this Brief, I have examined Rules 18 and 19 of the United States Court fo Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

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Three copies of within Brief of Appellee mailed this 24th day of January, 1964, to:

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